In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1443

ROBERT COSTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner and a codefendant were convicted of selling heroin to a federal narcotics agent, in violation of 21 U.S.C. 174, and of conspiracy to commit the act, a violation of 18 U.S.C. 371. The petitioner was sentenced to imprisonment for five years on each count, the sentences to run concurrently. The court of appeals affirmed the convictions on December 15, 1969 (Pet. App. A). The petition for a writ of cer-

tiorari, which was filed on April 20, 1970, is substantially out of time under Rule 22(2) of the rules of this Court and should, accordingly, be denied. See Brief for the United States in *Schacht* v. *United States*, No. 628, this Term, pp. 9-21.

The petition in any event raises no issues warranting further review.

1. Petitioner contends that the trial court erred in refusing to compel disclosure of the government's informant in this case and to grant a one-day continuance in the trial. These contentions, as well as those addressed to the sufficiency of the evidence, are fully answered in the opinion below (Pet. App. A). The fact is that petitioner did discover the name of the informant by Tuesday, the second day of trial.[1] While the court refused a defense request for a continuance until Thursday and ordered the defense to proceed, the case was in fact adjourned until Thursday. As the court below noted, the "conduct of defense counsel before, during, and after trial indicates that they were more interested in preserving a point for appeal than in the off chance that the informer's testimony would help them" (Pet. App. 45).

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[1] The government's bill of particulars, served on September 28, 1968, alleged that the sale occurred in Room 3206 of the Americana Hotel, New York City, at 2:15 a.m. on August 5, 1967 (See Supp. Index to Record on Appeal, p. 17). During the first day of trial, there was evidence that this room was rented by the informant (Tr. 56, 101-104). By the second day of trial, the defense had determined that F. P. Stitman of Cleveland, Ohio, rented the room on August 5, 1967 (Tr. 169, 302). That afternoon the trial was adjourned when the defense rested without presenting evidence (Tr. 356-357).

2. The opinion below also fully answers the claim that the district court erred in refusing to make an advance ruling that, if the petitioner took the stand, the government would be barred from using his recent counterfeiting conviction for impeachment purposes. The petitioner's prior conviction for uttering false money was an act "which reflects adversely on a man's honesty and integrity." *Gordon* v. *United States*, 383 F. 2d 936, 940 (C.A. D.C.). In the absence of a clear "substantial chance of unfair prejudice", *United States* v. *Palumbo*, 401 F. 2d 270, 273 (C.A. 2), certiorari denied, 394 U.S. 947, use of the conviction for impeachment purposes would have been proper.

3. Petitioner's contentions as to the validity of the application here of the statutory inferences created by 18 U.S.C. 174 concern matters that were fully considered by this Court in *Turner* v. *United States*, 396 U.S. 398.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

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[2] The punishment under 18 U.S.C. 174 (see Pet. 20, fn.) is not so great as to constitute cruel and unusual punishment. *United States* v. *Drotar*, 416 F. 2d 914, 916-917 (C.A. 5). See, also, *Gallego* v. *United States*, 276 F. 2d 914, 918 n. 4 (C.A. 9).

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